IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE

LETTER PATENT APPEAL NO. 449 OF 2004
IN
WRIT PETITION NO.6458 OF 2003

Mr.A.R.Khan Construwell & Co. ...Appellants

Vs.

1. Youth Education & Welfare Society
2. Silver Realtors Pvt. Ltd.
3. National (India) Contractors & Engineers
4. Al-Haj Ajmal Sarfaraj Khan
5. Mr. Wasim Sujjauddin Pirjade
6. M/s. Suyojit Buildech Pvt. Ltd.
7. Joint Charity Commissioner, Nashik
8. State of Maharashtra ...Respondents

Mr. B.P. Apte Senior Advocate with Mr. S.S. Kulkarni for the Appellants.

Mr.Mahendra Shah, Senior Advocate with Mr.Ranjit More for Respondent No.1.

Mr.S.M.Oak for Respondent No.2.

Mr. R.L. Majgaonkar for Respondent No.3.

Mr.S.G.Deshmukh for Respondent No.4 and 5

Mr.Nitin Thakkar, Senior Advocate with Mr.Bhandare with Ms.Suman Jain for Respondent No.6.

Mr.S.R. Nargolkar, A.G.P. for Respondents 7 & 8.

AND

LETTER PATENT APPEAL NO.454 OF 2004

IN

WRIT PETITION NO.6518 OF 2003

1. Al-Haj Ajmal Sarfaraj Khan
2. Wasim Sujauddin Pirjade ...Appellants

Vs.

1. Youth Education & Welfare Society

Nashik

2. Silver Realtors Pvt. Ltd.

3. National (India) Contractors

4. A.R. Khan Construwell Company

5. M/s. Suyojit Buildtech Pvt. Ltd.

6. The Joint Charity Commissioner Nashik

7. State of Maharashtra ...Respondents

Mr. S.G. Deshmukh for the Appellants.

Mr.Mahendra Shah, Senior Advocate with Mr.Ranjit More for Respondent No.1.

Mr. S.M. Oak for Respondent No.2.

Mr.Nitin Thakkar, Senior Advocate with Mr.Bhandare with Ms. Suman Jain for Respondent No.3.

Mr. S.S. Kulkarni For Respondent No.4.

Mr.B.P. Apte, Senior Advocate with Mr.S.S. Kulkarni for Respondent No.4.

Mr. S.R. Nargolkar, AGP for Respondent Nos.6 & 7.

AND

LETTER PATENT APPEAL NO.448 OF 2004

IN

WRIT PETITION NO.6459 OF 2003

1. Ahmed Dagumiya Shaikh
2. Murtaz Abdul Razak Chanegav
3. Abdul Razak N. Chanegaon
4. Rafique N. Chanegaon
5. Iqbal Gafoor Shaikh ...Appellants

Vs.

1. New Education and Welfare Society
2. Silvar Realtors Pvt. Ltd.
3. National (India) Contractor

4. Appellant Haji Ajmal Sarfaraj Khan
5. Wasim Sajauddin Peerzade
6. A.R. Khan, Construwel Company
7. M/s Suyajit Built-tech Pvt. Ltd.
8. Joint Charity Commissioner
9. State of Maharashtra ...Respondents

Mr. K.S. Bapat for the Appellants.

Mr.Mahendra Shah, Senior Advocate with Mr. Ranjit More for Respondent No.1

Mr. S.M. Oak for Respondent No.2.

Mr. Nitin Thakkar, Senior Advocate with Mr.Bhandare with Ms. Suman Jain for Respondent No.3.

Mr. S.G. Deshmukh for Respondent Nos.4 to 6.

Mr. S.R. Nargolkar, AGP for Respondent Nos.8 & 9.

CORAM: H.L. GOKHALE &
SMT.R.S.DALVI, JJ.

DATE OF RESERVING THE JUDGMENT : 21ST JULY 2005

DATE OF PRONOUNCING THE JUDGMENT: 23RD SEPTEMBER 2005

JUDGMENT: (Per H.L. Gokhale, J.)

1. These three LPAs are concerned with an immovable property of the first Respondent bearing Survey No.643-b corresponding to CTS No.614-b or final Plot No.127 and PTR No.F/1892/at Nasik admeasuring 40 gunthas which is a Charitable Trust registered under the Bombay Public Trusts Act, 1950 (for brevity the Act is referred to hereinafter or the BPT Act). The first Respondent Trust has obtained the said property upon transfer from a previous trust Anjuman Khairul Islam to whom it was

transferred by one Muslim Education Society, Nashik which was granted the said property under a State Government Sanad dated 9th February, 1934. As per the terms of the Sanad a structure consisting of 12 rooms has been constructed. The property was required to be used as a hostel for muslim boys.

2. The said Muslim Education Society, Nashik was dissolved under a resolution passed on 29th July, 1973 under which its properties came to be transferred to one Anjuman C. Khairul Islam, Bombay with the consent of the then Charity Commissioner and this Trust later on transferred it to Respondent No.1 in July, 1989 as per the previous permission and consent of the then Charity Commissioner dated 24th November, 1988.

3. The objects of the first Respondent Trust are educational. They include maintaining schools, colleges, hostels, libraries, educational institutions for technical, pharmaceutical, medical, polytechnical and agricultural courses, to award scholarship to deserving students, to supply books, stationary etc. to students, to maintain dispensaries, hospital, medical centres and grant relief to public, to arrange for sports and to amalgamate with any other institutions with similar objects.

4. The aforesaid Trust property is stated to be worth Rs.40 lakhs. It has an old dilapidated construction of 12 rooms used as a hostel for muslim boys stated to be worth Rs.1.20 lakhs. The Trust property therefore, in its entirety is valued at Rs.41.20 lakhs.

5. The property houses about 35 students. Respondent No.1 Trust intends to cater to the increasing demand of the students by making a provision for 200 students.

6. The Trustees of Respondent No.1 therefore sought to develop their property. They got a tender document prepared for inviting tenders for developing their plot of land. The tender document was prepared by one Advocate M/s. Deshpande and the Architect of the Trust. A public notice was issued in two newspapers circulated in Nashik, one in English and the other in Marathi. The offerers were to purchase the tender forms at a cost of Rs.10,000/- each. In all 14 offerers collected the tender forms and out of them eight submitted the tender forms. Four were found not eligible in terms of the conditions of the tender. The Trustees examined the tenders of 4 offerers who were found eligible. The Trustees thereafter increased the rate of the tender for the benefit of the Trust. Certain offerers offered

higher bids. Ultimately the tender of Respondent No.6 came to be accepted being the highest and better suited.

7. The Trustees applied to the learned Charity Commissioner to sanction the lease to be executed upon the development of the property of the Trust under Section 36 of the BPT Act, 1950.

8. The Appellants and Respondents 2 to 5 in L.P.A. No.449 of 2004 opposed the sanction (Respondent Nos.4 and 5 in L.P.A. No.449 of 2004 are the Appellants in L.P.A. No.454 of 2004). The learned Charity Commissioner by his judgment and order dated 26th June, 2003 granted sanction for the development of the property of the first Respondent Trust under Section 36(1)(b) under the BPT Act, 1950 in favour of Respondent No.6 for an increased premium amount of Rs.7.25 crores and upon certain terms and conditions as stated in the judgment.

9. The Appellants in these LPAs challenged the judgment and order of the learned Charity Commissioner by filing Writ Petition Nos.6458 of 2003, 6459 of 2003 and 6518 of 2003.

10. A learned Single Judge of this Court, who heard the Petitioners, finally dismissed the said Petitions by

his Judgment and Order dated 1st October, 2004. The status-quo order which was operating pending the Writ Petitions, was however continued for four weeks. These LPAs challenge the said order.

11. The powers and duties of the Trustees to act in the interest of the Trust and the powers of the Charity Commissioner to consider the interest, benefit and protection of the Trust whilst dealing with the immovable property of the Trust for its development come up for consideration in these applications.

12. It need hardly be stated that the Trustees are enjoined to use and utilise the trust properties to the highest extent possible for a benefit and interest of the Trust and to attain the objects of the Trust.

13. The Trust property has been granted under a Sanad of the Government. The Sanad is for utilising the Trust property for construction of a structure on 1/4th of the Trust property for a hostel for muslim boys. However, the Trust has wider objects which require to be accomplished. The construction on the Trust property had become dilapidated. In the meanwhile, the demand for the hostel accommodations has increased manifold. The Trust property was not being used for any purpose or for carrying out any other objects of the Trust other

than as a hostel. The Trustees wanted to develop the Trust property so as to procure funds for obtaining other immovable properties to realise the other objects of the Trust.

14. Under these circumstances, the Trust invited tenders and considered them. The tender document would itself show the endeavour of the Trustees to obtain the best possible offer of development that the property is capable of.

15. The tender form was to be collected by the offerers upon payment of Rs.10,000/-. The offerers were required to submit a Demand Draft of Rs.50 lakhs as a refundable deposit in the name of the Trust along with the tender. The tenderers/offerers (developers) were to obtain the required statutory sanction from the Charity Commissioner, Collector, Revenue Authorities, Urban Land Ceiling Office, and obtain the necessary building plan approved from the Nashik Municipal Corporation at their cost under Clauses 7 to 9 of the Tender document.

16. Further under Clauses 11 to 18, which dealt with the construction of the building, its FSI as well as future inflow of the Trust, the Trust was to receive the following :-

(a) The Trust was to remain the exclusive owner of the building so constructed. The minimum FSI of 1:1 was to be used for the development. A further increase of FSI of 1:2 upon bringing in TDR for additional construction was to be considered.

(b) The basement was to be retained by the Trust for "pay and park".

(c) The top floor of the building having an area of 9568 sq. ft. was to be in the exclusive use of the Trust for the students' hostel purpose. These two premises were to be constructed as per specifications given in Annexure-B to the Tender.

(d) The terrace of the building was to belong to the Trust and no advertisement boards could be put up by any one without the permission of the Trust.

(e) The construction was to be put upon a foundation and plinth to bear the load of 7 floors. This provision was to be made although for construction of FSI of 1:1, only ground plus 3 upper floors could be constructed.

(f) The Trustees were to give lease of 99 years to the successful tenderer and at the end of the period of lease the lessee would not be entitled for the

compensation of any constructed area of the property and the constructed property would have to be surrendered to the Trust free of cost and without damage.

(g) The Trust was to receive a rent at the rate of Rs.2/- per sq. ft. for the shopping galas on the ground floor of the constructed building and at the rate of Rs.1/- per sq. ft. for the office premises on the first and the upper floors.

(h) The tenderer as the lessee would be required to deposit an amount of Rs.100/- per sq. ft. for the maintenance of the building.

(i) The successful tenderer as a lessee would not be entitled to transfer his leasehold rights without the prior consent of the Trust and to pay transfer charges at the rate of Rs.100/- per sq. ft. for the upper floors along with rentals at the rate of 10% more than the existing rent.

17. It may be stated that for obtaining such inflow of funds to the Trust (which could be used for realising the other objects of the Trust other than running the hostel for muslim boys simplicitor), the financial strength and condition of the offerers to the specified minimum extent were laid down in clause 29 of the

tender. Under that clause the following conditions were deemed essential:-

(i) The prior construction works of the offerers were required to be to the extent of Rs.2 lakhs sq. ft. for the last 5 years prior to making the offer.

(ii) The last 3 years income-tax returns were to be submitted to show their financial stability.

(iii) The offerers were to submit a letter from their Bank showing their capability of giving Bank guarantee for payment of future sums.

(iv) The offerers were to show the infrastructure available with them for the completion of the proposed building within the time specified under clause 18 (which was 2 years for the construction of FSI to the extent of 1:1, and 3 years for the construction of the FSI to the extent of 1:2 from the date of the sanction of the Charity Commissioner).

(v) The offerer was to have a minimum turn over of Rs.2 crores per year for the last 5 years.

(vi) The offerer was to be a Class-A Registered and certified Contractor with the PWD of the State

Government.

18. The minimum total construction as proposed was to be to the extent of 43056 sq. ft. as stated in clause 34 of the tender, and as specified in Annexures A & B thereto.

19. The tender of Respondent No.6 came to be accepted as Respondent No.6 agreed with each of the conditions under clauses 11 to 18 and qualified under clause 29 of the tender. It is the case of the first Respondent that no other tenderer qualified completely. The qualifications of Respondent No.6 have not been disputed. The objections of the Appellants as well as Respondents 2 and 3 in LPA No.449 of 2003 are with regard to only the fact that according to them their objections were not correctly considered by the learned Charity Commissioner. Respondents 2 and 3 in LPA No.449 of 2003 do not now contest the offer in favour of Respondent No.6 any more. Hence, only the Appellants in these 3 Petitions remain as objectors to the lease and development of the Trust property.

20. The case of the Appellants in Petition No.449 of 2004 is essentially that they qualify with regard to 5 out of the 6 requirements of clause 29 of the tender and that the last term of clause 29 of the tender should not

have been incorporated therein to obtain the best quote. As noted above, the last condition required the certification of the applicant as Class-A contractor of the Government. Such certificate is issued to those Contractors who have the capacity of unlimited contracts which is over 25 crores as per income-tax clearance of the Contractors submitted to the Government. It is contended on behalf of the Appellants in LPA No.449 of 2004 that even other Contractors who carry on only private contracts and who may not have obtained the Government Certificate may be otherwise equally eligible and capable with regard to their contract work, but the embargo under the said clause eliminates such contractors whose services would enure to the benefit of that it is not for the offerers or the objectors to lay down the parameters of what the Trustees would deem fit and proper as the minimum requirement for developing their property. It would be for the Charity Commissioner to consider whether the offers received by the Trust from those found eligible under the yard-stick of the Trustees would enure for the benefit of the Trust.

21. The learned Charity Commissioner has considered the tender of the first Respondent Trust, the best offer of Respondent No.6 as well as the objections of the Appellants and concluded with reasons that the offer of

Respondent No.6 is for the benefit of the Trust. The learned Charity Commissioner has further caused an increase of the offers by the 4 eligible offerers resulting in the higher cash component being paid to the Trust ultimately by Respondent No.6. Consequently the cash component of Rs.6,74,56,219 has been raised to Rs.7.25 Crores as noted by the learned Charity Commissioner and as accepted by the Respondent No.6.

22. The objections of the Appellants in LPA No.454 of 2004 (who are Respondents 4 and 5 in LPA No.449 of 2004) and of the Appellants in LPA No.448 of 2004 are essentially that they are the well-wishers and donors and beneficiaries of the Trust and desire to protect and safeguard the Trust and the Trust property. They have contended initially that the Trust property was in good condition and does not require repairs and renovations and hence, there was no necessity to give the land on lease for any development. Alternatively, they contended that they would obtain donations from another Trust being one Maulana Azad Education Foundation for repair and renovation of the Trust property to run a hostel for muslim boys. It is however pointed out on behalf of the Trustees that there is a ceiling on the extent of donation which can be granted by that Trust to the first Respondent Trust and which would be grossly inadequate to meet the present demand of additional

students requiring hostel accommodation and would not allow any other objects of the Trust at all to be fulfilled.

23. Therefore, as an alternative the Appellants/ Respondents 3 and 4 have at the stage of the hearing of the Writ Petition before the learned Single Judge and upon his query brought another developer one Mr. Chapalkar to give a higher bid. However, the trustees point out that he does not qualify with regard to some of the requirements of clause 29 of the tender.

24. Though the Appellants have contended that the insistence upon Class-A grade Certificate of the Government would cause a loss to the extent of Rs.3.26 crores to the Trust, they have not shown any offer of 3.26 crores more than the offer of 7.25 crores cash component of Respondent No.6. Hence, it is difficult to accept such statement.

25. The Appellants further contend that the first Respondent Trust is not the owner of the trust property which continues in the name of the Muslim Education Society in the Revenue records. We are told that the contention had been taken up by them and rejected before the Circle Officer, Nashik with regard to a disputed entry made in the Revenue records by his order dated

19th August, 1996. A copy of the said order produced by Respondent No.1 Trust shows the objection taken by the Appellants/Respondents 3 and 4 under their application dated 23rd May, 1996. The said order has considered how the said Muslim Education Society came to be dissolved under a resolution dated 29th July, 1973 with the permission of the Charity Commissioner granted on 26th August, 1974 and how its properties came to be transferred to Respondent No.1 Trust on 22nd May, 1989 under another prior permission of the Charity Commissioner dated 24th November, 1988, which remained unchallenged until that application came to be filed on 23rd May, 1996. The entry in the Revenue records in favour of the Respondent No.1 Trust came to be certified under the reasoned order of the Circle Officer dated 19th September, 1996 and hence, the said contention lacks bonafides apart from the fact that it is taken up by the Appellants/Respondents 3 and 4 belatedly.

26. The learned Charity Commissioner has dealt with these objections also in the impugned judgment.

27. It would be material to primarily understand what benefits and rights the first Respondent Trust obtains under their transaction with Respondent No.6 for the development of the trust property and to compare the merits and de-merits, if any, of all the offerers of the

Appellants in both these appeals.

28. Mr.Thakkar, on behalf of Respondent No.6, has submitted a statement showing the expenses required to be incurred by Respondent No.6 on the project and its outflow. The Trust would stand to gain about Rs.13.25 crores from this project. The total construction cost at the rate of Rs.600/- per sq.ft. for the total construction of 57408 sq.ft. totals to Rs.3.50 crores for the construction of basement and ground + 3 upper floors under clause 34 of the Tender Notice. The nazrana fees payable to the Government for the transfer of the rights under the Sanad of 1934 is Rs.2 crores. The cash premium amount as determined by the Charity Commissioner upon the increase of the amount payable to the Respondent No.1 Trust is Rs.7.25 crores. Rs.50 lakhs have already been deposited by Respondent No.6 with Respondent No.1 Trust as per the terms of the tender. Further, Respondent No.6 would have to bear the stamp duty and registration charges. All these aspects have been considered by the learned Charity Commissioner.

29. Besides these, the inflow in terms of actuals which would accrue to the Trust is stated to be under two heads:

(a) One time payment of maintenance deposit for

33488 sq.ft. at the rate of Rs.100/- per sq. ft. amounting to Rs.33,48,800/-.

(b) The recurring income which would accrue to the Trust upon the agreed rent payable at the rate of Rs.2/- per sq. ft. for the shopping galas and Rs.1/- per sq. ft. of the office premises would be Rs.3,72,000/- per annum and Rs.2,48,000/- per annum respectively.

(c) Further the transfer charges payable on transfer of the car parking charges for the pay and *park in the basement would be* additional income of the Trust.

30. As against this, the offer of the Appellants in Appeal No.449 of 2004 shows the non-performance of the conditions set out in clause 29 of the tender almost entirely.

(a) Whereas the works carried out by the offerers to the extent of 2 lakhs sq. ft. are required to be shown in the last 5 years prior to the *tender* offer, the Appellants have shown the experience of their firm as well as their sister concerns, (without particulars of their own independent contracts), for the 24 years that they have been in business. Consequently, reply of the Appellants does not answer the question of the Trustees. The list of certain contracts provided by the Appellants

show the works executed not only by them but by their sister concerns between 1981 to 1997 as against the tender requiring the last 5 years contracts before 2002. However, the documents of the Appellants themselves do not show any single material contract of the Appellants within the specified period of five years. It is rightly contended on behalf of the Trustees that the Trust was not interested in the contracts executed by the sister concerns of the Appellants firm and that their financial stability would not be reflected in the contracts of the last 24 years as on the date of the tender.

(b) The income-tax returns required to be submitted show no stability of the Appellants with respect to payments expected and required to be made under the contract. The income tax returns reflect a poor position of the Appellants financial condition. They show that their income, meagre as it is, (atleast as reflected in the income tax returns), is mostly available out of gift funds. The first Respondents have obtained an opinion of the C.A. which shows that the income-tax returns of the Appellants do not reflect any investment of the *Appellants* in the firm or any income from the firm for the relevant assessment years. The tax returns not having been submitted for certain years, it can be seen that the firm was not assessed to income

tax during those years. The returns further show that the firm had no business income and business activity and that the Appellants' firm was a defunct firm with a capital of merely Rs.20 lakhs which would be grossly inadequate to meet the liabilities of the Trustees' project of about 13 crores. The income tax returns are not at all commensurate with the returns expected of the developer of a project running into several crores.

(c) The letter required from the Bank of the Appellants showing the ability of the Appellants to furnish Bank guarantees for payment of future sums, which are distinctly a large sums was also not suitably obtained by the Appellants as the objectors.

(d) The infrastructure available with the Appellants was also not shown to satisfy the limit of time for construction set out in the tender. This was despite the fact that time was to be the essence of the contract under clause 30 of the tender.

(e) The Appellants have not shown any turnover, much less the required turnover of Rs.2 *crores per year for the last 5 years.*

(f) They were not Class-A certified contractors of the Government and in fact contended that, this

requirement was a redundant one and a disabling requirement.

(g) Even the initial deposit of Rs.50 lakhs to be made at the time of the tender was offered to be made conditionally by the Appellants only after their offer was accepted by the Trust. No Demand Draft was actually given by the Appellants to the Trust; only a xerox copy of the Demand Draft was handed over to the Charity Commissioner.

31. Upon a query from the learned Single Judge, the Appellant in LPA No.454 of 2004 brought in the offer of one Mr.Chapalkar. However that offer appears to be deficient since its inception for the following reasons:-

(a) Though he was a Government Contractor and was initially a Class-A Contractor, his certificate has expired. The Appellants have not produced the latest certificate of Mr. Chapalkar despite Respondent No.6 objecting that his last certificate is not of Class I-A but is of Class I-C Contractor denoting the ability to execute works only between Rs.7.5 crores to Rs.15 crores as per the Government notification with respect to such certificate dated 21st September, 2000. The Class I-C Certificate specifically does not meet the eligibility

criteria in the tender.

(b) The documents provided by the Appellants in LPA No.454 of 2004 on behalf of Mr.Chapalkar shows the execution of irrigation projects and construction of dams etc. by him. He is not shown to be in the construction of building works which requires different aptitude and considerations. Consequently, Chapalkar's extent of construction cannot be seen to meet the eligibility requirement under the tender of Rs.2 lakhs sq.ft. during the last 5 years before the tender.

(c) Though his turnover is seen to be about Rs.2 crores in the earlier two years, it is Rs.1.85 crores in the last year.

(d) His income tax returns show taxes paid consistently plummeting from Rs.21 lakhs to Rs.14 *lakhs and then to Rs.7 lakhs in the required 3 years prior to the tender.*

(e) He has not furnished letter from the Bank with regard to the Bank guarantee for future *payments.*

(f) The infrastructural availability required under the contract is not shown by him by way of *plant and machinery which would show the technical capability of*

the developer. His infrastructure instead shows trucks, vibrators and rollers which are required for irrigation but would be of little use for building construction.

(g) His offer of deposit of Rs.1 Crore has remained only on paper and is not matched by any *deposit.*

32. Thus the bid of Mr.Chapalkar produced at the instance of the Appellants has remained as one that does not meet the requirements of the Trust even at this stage.

33. Though the offer of Respondent No.6 is prima facie the best offer deserving acceptance, in the interest of the trust, Respondent No.6 has further, upon our query, offered to give one more floor to Respondent No.1 Trust if the proposed FSI of 1:2 is sanctioned and Respondent No.6 is able to construct 7 floors instead of only 3 floors in the proposed building. The Trustees of Respondent No.1 Trust have resolved further, to use such additional premises for housing a hostel Muslim girls (which is also an object of the Trust) with appropriate segregation in the Trust Building. This would further enure for the benefit and interest of the Trust.

34. Having noted the facts of the case and the submissions of the rival parties thereon, prima facie

there is no difficulty in saying that the offer of Respondent No.6 - M/s Suyojit Buildech Pvt. Ltd. was an offer which fulfilled all the expectations as laid down in the tender document and, therefore, there was nothing wrong in the decision of the Joint Charity Commissioner in according sanction to the proposal of the 1st Respondent Trust for developing its property through Respondent No.6. There are however certain legal objections raised with respect to the decision of the Joint Charity Commissioner as well as that of the learned Single Judge dismissing the writ petitions challenging the decision of the Joint Charity Commissioner, which we will have to deal.

35. Mr.Apte, learned Senior Counsel appearing for the Appellants, submitted that the Joint Charity Commissioner was in error in restricting the scope of his consideration when the application was made to him under section 36(1)(b) of the BPT Act. In this connection, we may refer to para 27 of the judgment of the Joint Charity Commissioner. The Joint Charity Commissioner has referred to the judgment of a Single Judge of this Court in **Arunodaya Prefab v. M.D. Kambli - (1979) Mah. L.J. 104**. In that matter, the Trustees had made an application to the Charity Commissioner for sanction of the proposed sale to the 2nd Respondent therein. To ascertain whether the price offered by that

party was a reasonable one, the Charity Commissioner directed the Trustees to invite offers for sale of the said property. The Trustees declined to do so on the ground that they had already entered into an agreement and that if the proposal was adverse to the interest of the Trust, the Charity Commissioner could decline the sanction, but he could not approve the uninvited offer of the Petitioners. In para 8 of his judgment, the learned Single Judge observed in the Arunodaya judgment that under section 36 it was not open to the Charity Commissioner to consider the uninvited offers except only to the extent that they might disclose to him what might be the market price of the concerned land. It was not open to him to sell it to the Petitioners or to require the Trustees to sell it to anyone other than the 2nd Respondent.

36. The learned Judge in his judgment impugned before us referred to another judgment of a Single Judge of this Court in **Girdhar Nichani v. Rev. E.H. Lewellen - (1991 Mah. L.J. 891**. The learned Single Judge has held in that matter that a builder whose bid is not accepted by the Charity Commissioner under section 36 has no locus standi to challenge his decision under Article 227 as he neither has any interest in the Trust nor is he a beneficiary. The learned Single Judge deciding Girdhar Nichani relied upon the earlier

referred judgment in Arunodaya Prefab (supra). Both these judgments are referred in para 27 of the judgment of the Joint Charity Commissioner. He has therefore proceeded to examine the offers of the uninvited parties only to find out as to whether the proposal given by the Trustees is getting a correct price for the Trust or not. He in fact brought about certain improvements in the proposal which Respondent No.6 accepted and, therefore, the Charity Commissioner accorded the approval under section 36 of the BPT Act.

37. It was submitted before the Joint Charity Commissioner and the learned Single Judge that the tender clause 29(vi) was an unnecessarily restrictive clause requiring a particular kind of certification of P.W.D. It was submitted that one may not have such a certificate and yet one may be a capable contractor to carry out the work. In para 43 of his judgment, the learned Single Judge framed the question as to whether the Joint Charity Commissioner should have changed the terms of the tender on the ground of its being inappropriate and that the objects would be better served by adopting a different eligibility criteria. He answered the question in the negative by relying upon the judgment of the Apex Court in the case of **Directorate of Education v. Educomp Datamatics Ltd. - AIR 2004 SC 1962**. The Directorate of Education had

invited open tenders with certain laid down eligibility criteria for supplying, installing and commissioning of computer systems in some 748 schools. The expenditure involved was in the range of Rs.100 crores and the Competent Authority took a decision that the tenders be invited from those suppliers having turnover of over Rs.20 crores for the last 3 years. The Apex Court refused to strike down the term of eligibility. It held that the Government had taken a conscious decision to deal with only one firm having adequate financial capacity to take up such a big project instead of dealing with multiple consulting companies. The Court held that it was for the concerned authority to set up its terms of the tender. It further observed that it would interfere with the administrative policy decision only if it is arbitrary, discriminatory, malafide or actuated by bias. It further held that the Government must have a free hand in setting up the terms of the tender and it is entitled to pragmatic adjustments which may be required by particular circumstances. It then observed that the courts cannot strike down the terms of the tender because it feels that some other terms would have been fair, wiser or logical. In the instant case, the learned Single Judge found that since a major project was to be undertaken, the capability of the contractor had to be ascertained in advance. If the authorities of the Trust therefore decided to insist on

"A" Class Certificate from P.W.D., the decision could not be faulted. Class "A" Certificate implies executing works in the past exceeding Rs.25 crores. If the Respondent No.1 insisted on that large financial strength, that could not be faulted as per the learned Single Judge. Mr.Apte submitted that the learned Judge should not have brought in the principles governing the Government tenders while dealing with a tender floated by a Public Trust. Here what was important was to find out as to what is in the best interest of the Trust. Any such fetters, which would be imposed in a Government tender, would not survive in a contract by a Public Trust.

38. Mr.Apte relied upon a few authorities in support of his proposition. But before we deal with the same, it would be appropriate to note the provision made in section 36 of the BPT Act. This section reads as follows:-

> "**36. Alienation of immovable property of public trust**.-
>
> (1) Notwithstanding anything contained in the instrument of trust -
>
> (a) no sale, exchange or gift of

any immovable property; and

(b) no lease for a period exceeding ten years in the case of agricultural land or for a period exceeding three years in the case of non-agricultural land or a building belonging to a public trust, shall be valid without the previous sanction of the Charity Commissioner. Sanction may be accorded subject to such condition as the Charity Commissioner may think fit to impose, regard being had to the interest, benefit or protection of the trust;

(c) if the Charity Commissioner is satisfied that in the interest of any public trust any immovable property thereof should be disposed of, he may, on application, authorise any trustee to dispose of such property subject to such conditions as he may think fit to impose, regard being had to the interest or benefit or protection of the trust;

(2) The Charity commissioner may revoke the sanction given under clause (a) or clause (b) of sub-section (1) on the ground that

such sanction was obtained by fraud or misrepresentation made to him or by concealing from the Charity Commissioner, facts material for the purpose of giving sanction; and direct the trustee to take such steps within a period of one hundred and eighty days from the date of revocation for such further period not exceeding in the aggregate one year as the Charity Commissioner may from time to time determine as may be specified in the direction for the recovery of the property;

(3) No sanction shall be revoked under this section unless the person in whose favour such sanction has been made has been given a reasonable opportunity to show cause why the sanction should not be revoked;

(4) If, in the opinion of the Charity Commissioner, the trustee has failed to take effective steps within the period specified in sub-section (2), or it is not possible to recover the property with reasonable effort or expense, the Charity Commissioner may assess any advantage received by the trustee and direct him to pay compensation to the

trust equivalent to the advantage so assessed."

39. In this matter, we are concerned with the application made by a public trust for a sanction under section 36(1)(b). As sub-section itself provides, the sanction may be accorded by the Charity Commissioner subject to such conditions as he may think fit having regard to the interest, benefit or protection of the trust. Thus, as the sub-section itself provides, if a public trust wants to either alienate or lease its property, it must first obtain the sanction to the proposal from the Charity Commissioner. While granting this sanction, the Charity Commissioner has to keep in mind the interest, benefit or protection of the trust and from that point of view he has the power to grant the sanction subject to such conditions as he may think fit.

40. To begin with, Mr.Apte referred to the observations of the Apex Court in para 13 of in **R.V. Naidu v. V. Naidu Charities - 1989 Supp (2) SCC 356**. The Apex Court referred to an earlier judgment in **Chenchu Rami Reddy v. Government of Andhra Pradesh (1986) 3 SCC 391**, which held that the property of religious and charitable endowments or institutions must be wholly protected. This is because a large

segment of the community has beneficial interest therein. The Court thereafter observed that a sale by private negotiations, which is not visible to the public eye and may even give rise to public suspicion, should not therefore be permitted unless there are special reasons to justify the same. The Court also added a note of caution that care must be taken to fix the reserve price after ascertaining the market value for safeguarding the interest of the endowment.

41. The next judgment relied upon by Mr.Apte was in the case of **Mehrwan Homi Irani v. Charity Commissioner, Bombay - (2001) 5 SCC 305**. In that matter, the Court found that the leasing of a major portion of a Trust land on the terms stipulated was not in the best interest of the Trust. In para 9 of its judgment, the Court noted that it was likely that there would be better offers from other parties. It however added that the offer made by the Appellants themselves was not very encouraging and the Respondents were right in not accepting the same. The Court also noted that there were some other offers from some well-known charitable institutions and observed that a further possibility of having agreements with better terms should be explored by Respondents Nos.2 to 4, the trustees. Thereafter the court passed the following order:-

"9. The counsel for the appellants also pointed out that it is likely that there would be better offers from other parties. The offer made by the appellants themselves is not very encouraging and the respondents were right in not accepting the same. However, we are told that there were some other offers also from some well-known charitable institutions. In the best interests of the Trust and its objects, we feel it appropriate that Respondents 2 to 4 should explore the further possibility of having agreements with better terms. The objects of the Trust should be accomplished in the best of its interests. Leasing out of a major portion of the land for other purposes may not be in the best interests of the Trust. The Charity Commissioner while granting permission under section 36 of the Bombay Public Trusts Act could have explored these possibilities. Therefore, we are constrained to remit the matter to the Charity Commissioner to take a fresh decision in the matter. There could be fresh advertisements inviting fresh proposals and the proposal of the 5th respondent could also be considered. The Charity Commissioner

> may himself formulate and impose just and proper conditions so that it may serve the best interests of the Trust. We direct that the Charity Commissioner shall take a decision at the earliest. We allow the appeal as indicated above and remit the matter to the Charity Commissioner in modification of the orders of the High Court in writ petition and that of the Charity Commissioner." (Emphasis supplied)

42. Thereafter Mr.Apte referred to a few judgments of this Court. Firstly, he referred to a judgment in **Madhukar v. S.K. Laul - 1993 Mah. L.J. 1107**. In that matter, the Court was concerned with certain decisions of the Income Tax Department concerning an Agreement of Sale of property of a Public Trust. This was in the context of Chapter XX-C of the Income Tax Act which makes provision to curb sales of immovable properties for apparent consideration which is less than the real. The Income Tax Department had taken the view that on going through the Agreement, it had found that the sale was subject to the approval of the Charity Commissioner and without such an approval the sale could not take place and hence Form No.37-I, which was filed, was invalid. The Division Bench [Per Mrs.Sujata Manohar, CJ. (as the learned Judge then was

in this Court)] observed in that context in para 5 as follows:-

> "5. The Charity Commissioner, under the Bombay Public Trusts Act is required to give his sanction bearing in mind the interest, benefit and protection of the trust. He has to apply his mind, inter alia, to the price at which the property is to be sold under the agreement. The Charity Commissioner has the power, in a given case, no come to the conclusion that the price at which the trustees have agreed to sell the property is not the price which would secure adequate benefit to the trust and he may reject the agreement on that ground. Even the terms of the agreement of sale which the trustees may have entered into are liable to be examined by the Charity Commissioner at the time when he grants his sanction."

43. Then reference was made to the observations in para 17 of judgment of another Division Bench of this Court in **Bomi Jal Mistry v. The Joint Charity Commissioner - 2002 (3) All M.R. 749**, which are to the following effect:-

"'17. Thus, in the first place, it is the discretion of the trustees to take a decision to sell or lease any immovable property of the trust. That decision, of course, is subject to the scrutiny of the Charity Commissioner. That is a matter which would be governed by the provisions of clauses (a) and (b) of sub section (1) of Section 36 of the Act. In the circumstances, it is only when the trustees make application for authorising them to dispose of any immovable property of the public trust, the same would be granted only if the Charity Commissioner is satisfied that such a course would be in the interest or benefit or protection of the trust and not otherwise. Merely because no statutory appeal against that decision is provided, that cannot be the basis for doubting the powers of the Charity Commissioner to grant such authority, if asked. In any case, the justness and correctness of the authorization granted by the Charity Commissioner is always subject to a judicial review."

44. Lastly, a reference was made to a judgment of the Supreme Court in **Kumar Constructions v. Deshastha Regved Sanstha - 2002 (5) Bom. C.R. 497**. In para 6

of that judgment, a learned Single Judge observed that merely because some party approaches the Joint Charity Commissioner at the last minute or for that matter before the High Court, substantially enhancing the offer that by itself cannot be a ground for interference with the decision of the Charity Commissioner according the sanction. However, the learned Judge thereafter observed:-

> "If a relatively better offer is made during the enquiry under section 36 of the Act it would be obligatory on the Joint Charity Commissioner to discard the same for reasons to be recorded therefor before preferring the proposed transaction of which sanction is sought by the trust. Only then the decision of the Joint Charity Commissioner, according sanction under section 36 of the Act, would stand the test of judicial scrutiny."

45. It was therefore submitted by Mr.Apte that the two judgments of the Single Judges in the case of Arunodaya Prefab and Girdhar Nichani (supra) rendered way back in 1979 and 1991 could not be said to be the good law and the Joint Charity Commissioner erred in relying upon the same. A learned Single Judge had held in Arunodaya (supra) that it was not open to the

Charity Commissioner to consider the uninvited offers from third parties except for ascertaining the market price of the property. In Girdhar Nichani (supra), it was held by another learned Single Judge that such a third party had no locus standi to file any writ petition. In Mehrwan Homi Irani (supra), the Charity Commissioner had granted permission under section 36 to lease the property to Respondent No.5. The Appellant had intervened before the Charity Commissioner and thereafter carried the matter to the High Court unsuccessfully. It was canvassed by the Appellants that there could be a better proposal and, as quoted above, the Apex Court directed the trustees to explore the possibilities of having agreements with better terms. Thus, as far as the principle of locus standi of intervenors is concerned, it is undoubtedly expanded. It is also seen from the above quoted para from this judgment that the Charity Commissioner may himself formulate and impose such just and proper conditions. Mr.Apte, therefore, submitted that the role of the Charity Commissioner was sufficiently wider and should not be read as restricted by comparing with the role of a writ court examining the conditions in a Government contract. He therefore submitted that the learned Single Judge was in error in extending the proposition in the case of Directorate of Education (supra) to a decision of the Charity Commissioner. In

his submission, the above referred para from Mehrwan Homi Irani clearly permitted the Charity Commissioner to himself formulate and impose just and proper conditions and not merely confine to the conditions set up by the trustees. The observations of the Division Bench in Madhukar v. S.K. Laul, Bomi Jal Mistry and Kumar Constructions (supra) are also to the same effect. He submitted that thus the role of the uninvited offerer could no longer be said to be limited only to ascertaining the market price of the property as held by a Single Judge in Arunodaya Prefab (supra).

46. The submissions of Mr.Apte were adopted by Mr.Deshmukh, learned counsel appearing for Respondents Nos.4 and 5. He submitted that their intention was first to point out that the proposed work could be executed through the help of Maulana Azad Education Trust. Alternatively, it was submitted that the offer of his clients be considered along with the financial capacity of its sister concerns. It was submitted that in any case Mr.Chapalkar has given a better offer and that be considered. Mr.Deshmukh criticised the award of the tender in favour of Respondent No.6 by submitting that there was a collusion between the parties inasmuch as one Mr.Deshpande was the advocate for the Trust who had drafted the terms of the tender and he also happened to be the advocate for Respondent

No.6.

47. Mr.Mahendra Shah, learned Senior Counsel appearing for Respondent No.1 Trust, countered the aforesaid contentions by submitting that it is the totality of the interest of the Trust which is to be kept in mind. In his submission, it was perfectly permissible for the Trust to impose a condition like Condition No.29(vi), as in the present case, and that it was justified in the facts herein. He submitted that the Joint Charity Commissioner examined all the aspects and came to the conclusion that the offer of Respondent No.6 was the best one and having given all opportunities, nobody had given any better offer. He therefore submitted that the learned Single Judge was absolutely right in rejecting the petitions filed by the Appellants herein.

48. Mr.Nitin Thakkar, learned Senior Counsel appearing for Respondent No.6, adopted the submissions of Mr.Shah and submitted that Respondent No.6 was a reputed contractor in the city of Nasik. It had given the best offer. As recorded earlier, he agreed on the instructions of Respondent No.6 to give one more floor to the Trust if the building was to go up to 7th floor to accommodate the girl students from the Muslim community. He vehemently denied the allegation of

collusion by pointing out that Mr.Deshpande is a senior advocate in Nasik and it is just a coincidence that he happens to be the advisor of the Trust as also of Respondent No.6. He submitted that nothing had been done especially to favour Respondent No.6 by Mr.Deshpande in his capacity as the advisor for the Trust. In any case, the acceptance of the proposal of Respondent No.6 by the Trust was subjected to the scrutiny before the Joint Charity Commissioner and on merits, he has found it to be the best proposal. Mr.Shah and Mr.Thakkar therefore submitted that all these appeals should be dismissed.

49. We have considered the submissions of rival counsel. As far as the legal submissions are concerned, there is great merit in the submissions of Mr.Apte. It is quite clear that the principle of locus standi has been expanded and any such parties, who want to give their offers in the interest of the Trust, cannot be restrained from participating in the proceedings before the Charity Commissioner or later on by challenging his decision. The proposition in Girdhar Nichani (supra) by a Single Judge cannot be said to be a good one in the light of the approach adopted by the Apex Court in Mehrwan Homi Irani. Similarly, the proposals of uninvited offerers cannot be restricted only to ascertain the market price as

held in Arunodaya earlier. It is clear from the judgment in Mehrwan Homi Irani that the Charity Commissioner can explore the possibility of having agreements with other parties on better terms. That was also the view of a Division Bench of this Court in Madhukar v. S.K. Laul (supra) when the Division Bench observed that the terms of agreement of sale are liable to be examined by the Charity Commissioner at the time when he grants the sanction. To that limited extent, the role of the Charity Commissioner, while scrutinising the proposal before him, cannot be compared to the role of a writ court examining the terms of a Government tender. In that sense, the reliance by the learned Single Judge on the judgment in Director of Education (supra) for interpreting the role of the Charity Commissioner under section 36 of the BPT Act was not apt. Section 36 of the BPT Act gave wide powers to the Charity Commissioner which are obviously given in the interest, benefit or protection of the Trust. The section itself provides that while according the sanction to the proposed lease or sale, the Charity Commissioner may impose such conditions as he may think fit to impose for this purpose. He can undoubtedly refuse to accord sanction. He may as well formulate and impose just and proper conditions which may serve the interest of the Trust as held in Mehrwan Homi Irani (supra).

50. The Respondent No.1 Trust has insisted upon clause 29(vi) which required Class "A" Certificate from P.W.D. That implied a certain scrutiny by a public authority with respect to the financial strength of the party concerned. In **Directorate of Education v. Educomp Datamatics (supra)**, the proposed expenditure was in the range of Rs.100 crores and the tenderers had to have the turnover over Rs.20 crores. In the present case, the work involved and the benefit to the Trust was in the range of Rs.13.25 crores whereas the tenderer had to have "A" Certificate to show that he had executed works over Rs.25 crores. It was therefore possible to say that it was a stiff condition. However, the credentials of all the objectors and contenders have been examined by the Joint Charity Commissioner and the learned Single Judge and by us also. Even if this condition is kept aside, out of various objectors, none has shown any better financial strength than Respondent No.6. Mr.Chapalkar, the best amongst them, who is supported by some of the Appellants, had a Class "C" Certificate in the last relevant year and that too for executing works for the Irrigation Department and not the Building Construction. His income tax returns show his income going down during last three years to about Rs.7 lakhs. He did not submit any letter from a bank with regard to

bank guarantee for future payments nor did he make any deposit. The trustees are answerable to the public at large and to the community for whose benefit they are setting up a hostel. That has led them to provide stiff conditions. The terms of offer were scrutinised by the Charity Commissioner. It is going to get a good income for the Trust. It will be in two steps. Firstly, at the outset, when the construction begins and is completed and thereafter when there is any transfer of leased premises. The Trust will also receive continuous income from various sources. The entire parking space on the ground floor will be for the Trust to charge for the occupation thereof. The terrace will also be available to the Trust for installing hoardings to derive income therefrom. In the construction, which is presently proposed, one full floor will be available for the boys hostel and if the construction goes upto 7th floor, one more floor will become available for the girls hostel. The additional fund, which will be received by the Trust, could be utilised for its other educational activities. Considering that this plot is the only source of income of the Trust, in our view, this was the best bargain which the Charity Commissioner has rightly sanctioned. Even when we examined the alternative proposals (keeping aside condition of a certificate) we did not find that there was any proposal better than that of

Respondent No.6. The proposal of Respondent No.6 was in the interest, benefit and protection of the Trust.

51. In the facts of the present case, therefore, the learned Single Judge was right in dismissing all the writ petitions. In the circumstances, all the Appeals stand dismissed. Order of status quo granted earlier will stand vacated.

(H.L. GOKHALE, J.)

(SMT. R.S. DALVI, J.)

52. After the judgment was pronounced, Mr.Deshmukh, Mr.Kulkarni and Mr.Bapat applied for continuation of status quo for eight weeks to enable them to challenge this judgment and order in the Apex Court. Mr.More appearing for Respondent No.1 and Mr.Bhandari appearing for Respondent No.3 opposed this prayer. Inasmuch as the order of status quo has been running since filing of the Petition, we accept this request of the Appellants. Status quo will continue for a further period of eight weeks.

53. Counsel for the Appellants makes a statement, on instructions, that in the event any Special Leave Petition is filed, notice will be given to the Respondents.

(H.L. GOKHALE, J.)

(SMT.R.S. DALVI, J.)